UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/535
29 October 1991

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 535

Case No. 601: SHATILOVA

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 3 June 1991, Lioudmila Nikolaevna Shatilova, a staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application containing the following pleas:

"II. Pleas:

1. As a preliminary measure the Applicant requests the President of the UNAT [United Nations Administrative Tribunal] to request the Respondent to continue the employment of the Applicant until such time that the Tribunal has ruled on the case;

2. The Applicant seeks to obtain a renewal of her contract as G-8 Editorial Assistant at the International Civil Aviation Organization. She submits that the Respondent should have maintained her in service in accordance with article 59 of the Chicago Convention, the ICAO Staff Regulations and Rules, the relevant general principles of International Law as reflected in the Charter of the United Nations as well as her own record of her satisfactory employment with the Organization.

...

The Tribunal is also requested to:

1. Order the Respondent to provide the Applicant with a contract of employment following standard ICAO procedures;

2. Order payment to the Applicant of salary lost during the period of unemployment between the expiry of her contract and the reconstitution of employment;

3. In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of two years net base salary."

Whereas the Applicant filed an addendum to her application on 20 June 1991;

Whereas the Respondent filed his answer on 3 July 1991;

Whereas, on 28 August 1991, the Applicant filed written observations in which she requested the Tribunal:

> "to decide in the affirmative and to order her reappointment as Editorial Assistant G-8 retroactively from 12 June 1991 together with compensation for actual costs incurred as a result of the termination of the appointment.
>
> Alternatively, Applicant requests that the Tribunal order the case to be referred to the Secretary General of ICAO in accordance with the recommendation of C/LPB [Chief/Language and Publications Branch] and with normal ICAO procedures.
>
> In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of two years net base salary."

Whereas, on 11 and 13 September 1991 respectively, the Respondent and the Applicant submitted additional information at the request of the Tribunal;

Whereas the Respondent submitted additional documents on 3 October 1991 at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, a national of the USSR, entered the service of ICAO on 12 June 1989 under a fixed-term appointment for two years at the G-8 level as an Editorial Assistant in the Russian Section, Language and Publications

Branch, Bureau of Administration and Services. Her candidature for that post had been presented to ICAO on 4 January 1988 by the Representative of the USSR on the Council of ICAO. With effect from 28 November 1989 the Applicant's post was transferred, and the Applicant reassigned, to the newly created Russian Editorial Unit, within the Russian Section.

On 14 December 1990 the Applicant, whose contract was due to expire on 11 June 1991, requested in a memorandum to the Chief of the Personnel Branch that her contract be renewed for a further period. On 17 December 1990 her request was "fully supported" by the Chief of the Language and Publications Branch on the ground that, according to the Chief of the Russian Section, her performance had been "satisfactory throughout".

On 14 January 1991, in a memorandum addressed to the Secretary General of ICAO "to present ... the position of the USSR Administration concerning further implementation of the principle of rotation of the Soviet staff in the Russian Section of the ICAO Secretariat", the Representative of the USSR on the Council of ICAO stated:

> "The USSR Administration has continuously been taking steps to submit in a timely manner qualified candidates with adequate experience to fill vacancies in the Russian Section. In respect of appointments for USSR citizens in ICAO the USSR Administration follows the principle of secondment or Government release which is given for a certain period of time and ensures rotation of Soviet specialists."

He noted that in 1991 the "Government release" would expire in respect of eight staff members of the Russian Section - including the Applicant -, who would return home upon termination of their contracts, and he announced that the qualified candidates to replace those staff members had been selected. On 16 January 1991 the Representative of the USSR submitted to the Secretary General the candidacy of a certain Ms. V.A. Kozlovskaya for "the post of Editorial Assistant in the Russian Section to be vacant in June 1991." On 9 April 1991 the Secretary General sought from the Representative of the USSR additional information on "the secondment status of the Soviet staff in light of United Nations Tribunal Judgements Nos. 92, 192, 333 and 482 in which the criteria for recognizing the secondment status of staff have been established." On 11 April 1991 the Representative of the USSR replied in part:

"...

We once again affirm that in the execution of its personnel policies for the selection, training and assignment of Soviet specialists to work within the ICAO Secretariat, the Administration of the USSR fully implements the principles of secondment, which provide for tripartite cooperation in defining reciprocal rights and obligations.

...

All persons who receive the consent of the Soviet Administration to their working in the ICAO Secretariat (Russian Section) are advised orally by a representative of the Administration of the termination date indicated on their contracts.

Thus the principle of tripartite cooperation is implemented on the basis of the provisions of the Chicago Convention and in compliance with the terms of the oral understanding between the ICAO Administration and the Administration of the USSR, taking into account the specific characteristics of the staffing of the Russian Section, including recruitment and training of personnel.

...

The written tripartite understanding concerning the term of service agreed upon is stipulated in the contract which is signed by the Secretary General of ICAO and the professional or general service staff member, and is confirmed by the written consent of the Representation of the USSR on the basis of a decision by the Soviet Administration.

..."

On 8 May 1991 the Applicant reiterated her request for a contract renewal in a memorandum addressed to the Secretary General; she added:

"I would like herewith to confirm that I am not presently employed in the service of the Government of the Soviet Union; nor have I ever concluded any secondment agreement with the USSR Government and/or ICAO for that matter."

On 10 May 1991 the Secretary General informed the Applicant that he was unable to comply with her request; he drew her attention to the clause in her letter of appointment stating that the appointment carries no expectancy of renewal upon expiry.

On 13 May 1991 the Applicant requested the Secretary General to review his decision not to extend her contract or, if that was impossible, to suspend the decision under staff regulation 11.4 until the recourse procedure had been exhausted and a final judgement of the Tribunal rendered in the case. On 21 May 1991 the Secretary General rejected both requests of the Applicant but agreed to direct submission of her application to the Tribunal should she wish to appeal against his decisions. On 3 June 1991 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The refusal by the Respondent to renew the Applicant's contract was illegal because the Applicant was not given any consideration or explanation.

2. The Applicant was not given the true reason for the denial of further employment, which is a confidential and unwritten agreement between ICAO and the USSR Government concerning the recruitment of staff in the Language and Publications Branch.

3. The Respondent's decision was arbitrary, based on considerations contrary to and in conflict with the Chicago Convention, the ICAO Staff Regulations and Rules and general principles of international law, and constituted an abuse of power.

4. Non-observance by the Respondent of his obligations under the Chicago Convention, the ICAO Staff Regulations and Rules and the relevant principles of international law constituted discriminatory treatment of the Applicant as compared to other, non-USSR, ICAO staff members.

5. In the absence of a secondment agreed to by all parties in conformity with the principles reaffirmed in Judgement No. 482, the Respondent cannot legally rely on decisions by a government to justify his own action with regard to the employment of the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant accepted the appointment offered to her by ICAO together with all the terms and conditions therein. The appointment carried no expectancy of renewal upon expiry. A letter of appointment is a contract binding upon both parties, the Organization and the staff member, and the

Applicant was fully aware from the time she accepted it that her appointment would terminate on its expiry date without further notice. Therefore, the decision of the Respondent not to renew her contract was not arbitrary and was not in conflict with the Chicago Convention, the ICAO Staff Regulations and Rules or general principles of international law; not did the decision constitute an abuse of power.

2. In taking the contested decision, the Respondent gave careful consideration to all relevant factors, including the secondment aspects; he did not depart from the established practice which has been followed over the years with respect to Soviet staff members in the General Service category.

3. The Applicant disputes the existence of any formal secondment agreement between her, ICAO and the USSR Government, without offering any evidence that she is not on secondment from her national Administration.

The Tribunal, having deliberated from 21 to 29 October 1991, now pronounces the following judgement:

I. The Applicant, a national of the USSR, entered the service of ICAO on 12 June 1989 with a two-year fixed-term contract. On 14 December 1990 the Applicant requested that her contract be renewed. The request was not granted. The final decision refusing to renew the contract was taken by the Respondent on 21 May 1991. This is the contested decision.

II. The Respondent does not contest the Applicant's qualifications. Moreover, the Chief of the Language and Publications Branch backed up the request of the Applicant, whose performance, according to the Chief of the Russian Section, had been "satisfactory throughout".

III. The Respondent bases his decision mainly on legal grounds. According to resolution A14/6 of the ICAO Assembly, "in cases where it is desired to recruit a person from the Government Service of a Contracting State, the Secretary General shall take all practical steps to obtain the consent and co-operation of that State". Pursuant to that provision, the Secretary General requested the consent of the USSR Government to the renewal of the

Applicant's contract. He did not obtain that consent. The Secretary General considered that he was therefore not able to renew the contract.

IV. The Tribunal considers that the provision invoked by the Respondent applies both to the recruitment of ICAO personnel and to the renewal of their contracts.

V. However, according to the actual wording of paragraph 3 of resolution A14/6 of the ICAO Assembly, the person concerned must be "from the Government Service of a Contracting State".

The Applicant contends that when she entered the service of the Organization she ceased to belong to a governmental organization or a public institution or enterprise of the USSR. She indicates that on the date when she requested the renewal of her contract she was not in the government service of the USSR. At no time did the Representative of the USSR to ICAO inform the latter of any arrangements made to find the Applicant a post or to reinstate her in her former post when she returned home at the end of her contract.

The Respondent was therefore not able to determine that the Applicant was indeed in the government service of the USSR when she requested a new contract.

VI. In view of all the information in the file, the Tribunal considers that at the time when the Applicant requested the renewal of her contract she was not in the "Government Service of a Contracting State" in the sense of paragraph 3 of resolution A14/6 of the ICAO Assembly. The Respondent was therefore not obliged to request the consent of the USSR Government in order to proceed with the renewal of the contract. By requesting such consent and basing his decision on the USSR Government's refusal to give its approval, the Respondent committed an error of law.

VII. The Tribunal considers that this error of law vitiates the decision taken. However, the Tribunal in no way questions the good faith of the Respondent, who was faced with a complex and confusing situation. In this

instance, the Respondent was required under article 59 of the Chicago Convention to determine independently, in the interest of the Organization, whether the Applicant's contract should be renewed.

VIII. There is no doubt that the Applicant's status was not the same as that of personnel seconded by their Governments. The Tribunal has defined in its jurisprudence the conditions for such secondment and they have not been satisfied in this instance.

IX. Article 58 of the Chicago Convention states that the ICAO Assembly may determine the status of the personnel by its rules. It further states that the Council of the Organization shall determine, subject to those rules and to the provisions of the Convention, the method of appointment and of termination of appointment, the training, and the salaries and conditions of service of the personnel. Article 59 of the Chicago Convention stresses the international character of the responsibilities of the personnel. The Tribunal emphasizes that it does not wish to weaken those provisions by this judgement.

X. Similarly, the application of paragraph 3 of resolution A14/6 is not affected by this judgement, provided that the candidate for recruitment to the international civil service is in the government service of a Contracting State and has not left the service of his Government.

XI. The Tribunal considers that the error committed by the Respondent entails his responsibility and entitles the Applicant to compensation.

XII. For the foregoing reasons, the Tribunal:

1. Decides that the Secretary General of ICAO shall pay the Applicant, as compensation, her salary and related allowances from the date when her service ended until 31 December 1991 or until the date on which the Secretary General takes the decision referred to in paragraph 2 below, if this decision is taken before 31 December 1991.

2. Invites the Secretary General to re-examine the Applicant's request for renewal of her contract, to inform the Applicant of his decision before 31 December 1991, and also to inform the Tribunal of that decision.

3. Rejects all the other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 29 October 1991

Jean HARDY
Acting Executive Secretary

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ADMINISTRATIVE TRIBUNAL

Judgement No. 536

Case No. 605: KRAVCHENKO

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 18 June 1991, Youri Andreevich Kravchenko, a staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application containing the following pleas:

"II. Pleas:

1. As a preliminary measure the Applicant requests the President of the UNAT [United Nations Administrative Tribunal] to request the Respondent to continue the employment of the Applicant until such time that the Tribunal has ruled on the case;

2. The Applicant seeks to obtain a renewal of his contract as P-4 Language Officer at the International Civil Aviation Organization. He submits that the Respondent should have renewed his contract in accordance with article 59 of the Chicago Convention, the ICAO Staff Regulations and Rules, the relevant general principles of International Law as reflected in the Charter of the United Nations as well as his own record of his satisfactory employment with the Organization.

...

The Tribunal is also requested to:

1. Order the Respondent to provide the Applicant with a contract of employment following standard ICAO procedures;

2. Order payment to the Applicant of salary lost and related costs incurred during the period of unemployment between the expiry of his contract and the reconstitution of employment;

3. In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of three years net salary."

Whereas the Respondent filed his answer on 11 July 1991;

Whereas, on 2 September 1991, the Applicant filed written observations in which he requested the Tribunal:

> "to decide in the affirmative and to order his reappointment as P-4 Language Officer retroactively from 29 June 1991 together with compensation for actual costs incurred as a result of the termination of the appointment.
>
> In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of three years net base salary."

Whereas, on 11 and 13 September 1991 respectively, the Respondent and the Applicant submitted additional information at the request of the Tribunal;

Whereas the Respondent provided additional documents on 3 October 1991 at the request of the Tribunal;

Whereas the facts in the case are as follows:

On 12 February 1986 the Secretary General of ICAO informed the Representative of the USSR on the Council of ICAO of his intention to offer a fixed-term appointment as Language Officer to the Applicant, a national of the USSR; pursuant to the provisions of paragraph 3 of Resolution A14/6 of the ICAO Assembly ("In cases where it is desired to recruit a person from the Government Service of a Contracting State, the Secretary General shall take all practical steps to obtain the consent and co-operation of that

State and, if appropriate, its advice as to the suitability of the person for the position in question"), he requested "the consent of your Government to extend this offer and your cooperation in facilitating the early release of Mr. Kravchenko." On 13 February 1986 the Representative of the USSR informed the Secretary General that his Government had agreed to the offer. On 19 February 1986 a cable was sent to the Applicant offering him a three year fixed-term appointment and asking him to cable whether he accepted in principle. On 28 February 1986 the Representative of the USSR informed the Chief of the Personnel Branch that the Applicant had agreed to the terms of the appointment. By a letter dated 11 March 1986 the Applicant was formally offered a fixed-term appointment for three years at the P-4 level as a Language Officer (Interpreter/Translator) in the Russian Section, Language Branch, Bureau of Administration and Services. He signed the letter of appointment on 18 March 1986 and entered on duty on 6 June 1986.

On 18 November 1988 the Secretary General informed the Representative of the USSR of his intention to offer to the Applicant a further appointment of one year from 6 June 1989; he again requested the consent of the Government of the USSR under paragraph 3 of Resolution A14/6 of the ICAO Assembly. On 14 December 1988 the Representative of the USSR informed the Secretary General that his Government had agreed to the offer and was releasing the Applicant for another year up to 5 June 1990. A letter of appointment was prepared accordingly and the Applicant signed it on 14 February 1989. The same procedure was followed for the further appointment of the Applicant for one year from 6 June 1990 to 5 June 1991.

On 14 January 1991, in a memorandum addressed to the Secretary General of ICAO "to present ... the position of the USSR Administration concerning further implementation of the principle of rotation of the Soviet staff in the Russian Section of the ICAO Secretariat", the Representative of the USSR stated:

> "The USSR Administration has continuously been taking steps to submit in a timely manner qualified candidates with adequate experience to fill vacancies in the Russian Section. In respect of appointments for USSR citizens in ICAO the USSR Administration follows the principle of secondment or Government release which is given for a certain period of time and ensures rotation of Soviet specialists."

He noted that in 1991 the "Government release" would expire in respect of eight staff members of the Russian Section - including the Applicant -, who would return home upon termination of their contracts, and he announced that the qualified candidates to replace those staff members had been selected. On 18 January 1991 the Representative of the USSR submitted the name of a candidate to replace the Applicant in the post of Interpreter/Translator in the Russian Section to be vacant in June 1991.

On 9 April 1991 the Applicant sent to the Secretary General a memorandum in which he requested to continue in the service of ICAO beyond the date of expiry of his appointment; his memorandum read in part as follows:

> "1. ... My present contract will expire on June 6, 1991. In respect to my present contract I never received decision regarding termination or any offer to continue to serve. Only by chance did I find out that a vacancy notice concerning my post was released by the Organization while I was on home leave. It is my understanding that the procedure called 'secondment' was applied to my case.
>
> 2. I have recently learned through FICSA [Federation of International Civil Servants Associations] newsletters and the ICAO Staff Association Bulletin that, by virtue of the Presidential Decision of 12 October 1990, further confirmed by the USSR Governmental Ordinance 1280 of 15 December 1990, Soviet nationals, effective 1 January 1991 are no longer subject to the 'secondment' arrangement. I believe that my personal case does not differ in any way from the other cases now under consideration.
>
> ..."

On 25 April 1991, in a memorandum addressed to the Secretary General, the Chief of the Personnel Branch commented on the "change in secondment policy regarding Soviet language staff at the United Nations" and various specialized agencies; he concluded that the Applicant's request could only be decided on after the Secretary General had taken a policy decision on the secondment issue. On 15 May 1991 the Applicant reiterated his request. On 17 May 1991 the Secretary General informed the Applicant that he was unable to offer him another appointment but that he was prepared to extend his current appointment until 28 June 1991. On 23 May 1991 the Applicant, while accepting the offer of an extension, requested the Secretary General to

review his decision; since he intended to appeal a negative decision, he further requested a suspension of the decision during appeal and the Secretary General's consent to direct submission of an application to the Tribunal. In a reply dated 31 May 1991, the Secretary General maintained his decision, declined to suspend it during appeal and agreed to direct submission of an application to the Tribunal. On 18 June 1991 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The refusal by the Respondent to renew the Applicant's contract was illegal because the Applicant was not given any consideration or explanation.

2. The Applicant was not given the true reason for the denial of further employment, which is a confidential and unwritten agreement between ICAO and the USSR Government concerning the recruitment of staff in the Language and Publications Branch.

3. The Respondent's decision was arbitrary, based on considerations contrary to and in conflict with the Chicago Convention, the ICAO Staff Regulations and Rules and general principles of international law, and constituted an abuse of power.

4. Non-observance by the Respondent of his obligations under the Chicago Convention and the ICAO Staff Regulations and Rules and the relevant principles of international law constituted discriminatory treatment of the Applicant as compared to other, non-USSR, ICAO staff members.

5. In the absence of a secondment agreed to by all parties in conformity with the principles reaffirmed in Judgement No. 482, the Respondent cannot legally rely on decisions by a government to justify his own action with regard to the employment of the Applicant.

Whereas the Respondent's principal contentions are:

1. The terms and conditions of the Applicant's contract of employment have been fully observed.

2. In taking the decision contested by the Applicant, the Secretary General took all relevant factors into account, in particular the official release of the Applicant by the USSR Government. The Secretary General

neither violated the ICAO Staff Regulations and Rules nor took a decision which could be deemed as arbitrary or constituting an abuse of power.

The Tribunal, having deliberated from 21 to 29 October 1991, now pronounces the following judgement:

I. The Applicant, a national of the USSR, entered the service of ICAO in 1986 with a three-year fixed-term contract. This contract was renewed in 1989, 1990 and 1991, and expired on 28 June 1991. On 9 April 1991 the Applicant requested that his contract be renewed. The request was not granted. The final decision refusing to renew the contract was taken by the Respondent on 31 May 1991. This is the contested decision.

II. The Respondent does not contest the Applicant's qualifications. He bases his decision mainly on legal grounds. According to resolution A14/6 of the ICAO Assembly, "in cases where it is desired to recruit a person from the Government Service of a Contracting State, the Secretary General shall take all practical steps to obtain the consent and co-operation of that State". Pursuant to that provision, the Secretary General requested the consent of the USSR Government to the renewal of the Applicant's contract. He did not obtain that consent. The Secretary General considered that he was therefore not able to renew the contract.

III. The Tribunal considers that the provision invoked by the Respondent applies both to the recruitment of ICAO personnel and to the renewal of their contracts.

IV. However, according to the actual wording of paragraph 3 of resolution A14/6 of the ICAO Assembly, the person concerned must be "from the Government Service of a Contracting State".

The Applicant contends that when he entered the service of the Organization he ceased to belong to a governmental organization or a public institution or enterprise of the USSR. He indicates that on the date when he requested the renewal of his contract he was not in the government service of the USSR. At no time did the Representative of the USSR to ICAO

inform the latter of any arrangements made to find the Applicant a post or to reinstate him in his former post when he returned home at the end of his contract.

The Respondent was therefore not able to determine that the Applicant was indeed in the government service of the USSR when he requested a new contract.

V. In view of all the information in the file, the Tribunal considers that at the time when the Applicant requested the renewal of his contract he was not in the "Government Service of a Contracting State" in the sense of paragraph 3 of resolution A14/6 of the ICAO Assembly. The Respondent was therefore not obliged to request the consent of the USSR Government in order to proceed with the renewal of the contract. By requesting such consent and basing his decision on the USSR Government's refusal to give its approval, the Respondent committed an error of law.

VI. The Tribunal considers that this error of law vitiates the decision taken. However, the Tribunal in no way questions the good faith of the Respondent, who was faced with a complex and confusing situation. In this instance, the Respondent was required under article 59 of the Chicago Convention to determine independently, in the interest of the Organization, whether the Applicant's contract should be renewed.

VII. There is no doubt that the Applicant's status was not the same as that of personnel seconded by their Governments. The Tribunal has defined in its jurisprudence the conditions for such secondment and they have not been satisfied in this instance.

VIII. Article 58 of the Chicago Convention states that the ICAO Assembly may determine the status of the personnel by its rules. It further states that the Council of the Organization shall determine, subject to those rules and to the provisions of the Convention, the method of appointment and of termination of appointment, the training, and the salaries and conditions of service of the personnel. Article 59 of the Chicago Convention stresses the

international character of the responsibilities of the personnel. The Tribunal emphasizes that it does not wish to weaken those provisions by this judgement.

IX. Similarly, the application of paragraph 3 of resolution A14/6 is not affected by this judgement, provided that the candidate for recruitment to the international civil service is in the government service of a Contracting State and has not left the service of his Government.

X. The Tribunal considers that the error committed by the Respondent entails his responsibility and entitles the Applicant to compensation.

XI. For the foregoing reasons, the Tribunal:

1. Decides that the Secretary General of ICAO shall pay the Applicant, as compensation, his salary and related allowances from the date when his service ended until 31 December 1991 or until the date on which the Secretary General takes the decision referred to in paragraph 2 below, if this decision is taken before 31 December 1991.

2. Invites the Secretary General to re-examine the Applicant's request for renewal of his contract, to inform the Applicant of his decision before 31 December 1991, and also to inform the Tribunal of that decision.

3. Rejects all the other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 29 October 1991

Jean HARDY
Acting Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/537
1 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 537

Case No. 546: UPADHYA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 11 April 1990, Shail Upadhya, a staff member of the United Nations, filed an application containing the following pleas:

"II. PLEAS

Applicant seeks:

Retroactive wages and benefits at the D-1 level less wages and benefits received from no later than the date of confirmation of the appointment which was denied to Applicant.

Damages for the continuing hindrance to the development of Applicant's career.

Judgement ordering Respondent to find a suitable post for Applicant at the D-1 level."

Whereas the Respondent filed his answer on 10 December 1990;

Whereas the Applicant filed written observations on 15 March 1991;

Whereas the Applicant requested oral proceedings on 29 March 1991;

Whereas, on 6 August 1991, the President of the Staff Committee of the United Nations filed, with the permission of the Tribunal, an Amicus Curiae brief on behalf of the United Nations Staff Union;

Whereas the Applicant submitted an additional written statement on 12 August 1991;

Whereas, on 23 September 1991, the presiding member of the panel has ruled that no oral proceedings would be held in the case;

Whereas the Respondent submitted observations on the Amicus Curiae brief of the United Nations Staff Union on 23 September 1991;

Whereas the Applicant filed a supplement to his application on 7 October 1991;

Whereas the facts in the case are as follows:

In its Judgement No. 401 rendered on 12 November 1987 in favour of the Applicant, a Senior Political Affairs Officer (P-5) of the United Nations, the Tribunal, having found that the Administration had acted in derogation of the Applicant's rights stemming from a determination of unfair treatment made by the Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat, awarded compensation in the amount of $12,000 to the Applicant for the injuries he had sustained. The Tribunal further urged strongly that in the future the Administration monitor carefully the Applicant's career to ensure not only that it was in no way prejudiced by the events which had given rise to the proceeding, but that he received the fair treatment to which he was entitled.

In 1988 the post of Chief of the International Security and Regional Affairs Section, a D-1 post, became vacant in the Political Affairs Division of the Department of Political and Security Council Affairs. Its vacancy was announced in Vacancy Announcement 88-P-PSC-267-NY. Staff members at level D-1 or P-5 were eligible to apply. The Applicant and other staff members applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and Administrative Instruction ST/AI/338 of the same date (and its addenda).

According to this administrative instruction, the system was designed to fill through redeployment essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future, but

it was only the first step towards establishing a more rational human resources management system and towards a more comprehensive procedure that would involve a thorough review of all posts in the context of measures being taken to streamline and rationalize the Organization. Under the new system, all posts vacant or expected to become vacant would be reviewed by departments and offices to determine which posts were essential in order to meet programme mandates; all vacancies to be filled would be advertised and qualified staff members would be invited to apply, including those serving within the office where the vacancy was located; the candidates would be reviewed and evaluated by a Redeployment Committee - whose functions would be initially entrusted to the Appointment and Promotion Board at Headquarters for posts in the Professional category and above - which would recommend a short list of staff members determined to be the best qualified for each vacancy; and the short list of candidates would be communicated to the heads of department or office concerned, who would then make the final selection. However, as the 1986 promotion review was already under way, vacant posts already identified for staff members recommended for promotion would not be included in the review described above.

All applications for the post of Chief of the International Security and Regional Affairs Section were accordingly forwarded to the Appointment and Promotion Board which, at its 1524th meeting held on 16 March 1989, short-listed six candidates, including the Applicant, and decided that their names should be transmitted to the Department for final selection. Such transmission was effected on the following day by the Office of Human Resources Management in a memorandum from which it appears that four of the six candidates had more seniority in grade than the Applicant. On 3 April 1989 the Office of Human Resources Management informed the Applicant that, after careful evaluation of his application for the vacancy, he had not been selected for the post.

On 27 April 1989 the Applicant requested the Secretary-General to review and reverse the decision not to appoint him to the D-1 position; should that request be denied, he asked for the Secretary-General's consent to bring the matter to the Tribunal directly inasmuch as the issue presented was whether the Tribunal's decision in Judgement No. 401 had been implemented and inasmuch as the Tribunal's reference to monitoring his

career was tantamount to retaining jurisdiction for the purpose of supervising implementation of an ongoing remedy. Both requests were denied in a letter dated 1 June 1989 from the Assistant Secretary-General for Human Resources Management to the Applicant; concerning the request for the Secretary-General's consent to direct submission of the Applicant's case to the Tribunal, the Assistant Secretary-General stated that since the case arose from a new and separate set of facts from those in Judgement No. 401, waiver of the Joint Appeals Board proceedings would not be appropriate. On 1 July 1989 the Applicant lodged an appeal with the Joint Appeals Board.

The Joint Appeals Board submitted its report on 11 December 1989. The Board's conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 34. Firstly, the Panel concludes that the appellant's claim to the contested D-1 post in his Department on the basis of an alleged lack of implementation of Administrative Tribunal Judgement 401 was without foundation.
>
> 35. Secondly, the Panel concludes that the Vacancy Management and Redeployment System was introduced without the concomitant formal suspension or amendment of the relevant Staff Rules governing promotion. Thus, the provisions of staff rule 104.14 are still in effect.
>
> 36. Thirdly, the Panel concludes that the appellant did not show that he would have been promoted against the contested D-1 post if staff rule 104.14(f)(iii) had been adhered to. However, the appellant has been deprived of the right to be selected by an independent body established after consultations with the appropriate staff representative body, as set out in staff rule 104.14(f)(iii)(a), (b) and (c).
>
> 37. Accordingly, the Panel recommends that the appellant be awarded the sum of $1.00 in compensation for the fact that he has been deprived of one of his rights under staff rule 104.14.
>
> 38. The Panel makes no further recommendation in support of the appeal.
>
> 39. The Panel recommends that the Administration review any inconsistencies between the Vacancy Management System and the provisions of staff rule 104.14 and resolve these, either by amending the Staff Rules or adjusting the guidelines governing Vacancy Management."

On 13 February 1990 the Acting Under-Secretary-General for Administration and Management communicated the Secretary-General's final decision to the Applicant in a letter reading in part:

> "...
>
> The Secretary-General has re-examined your case in the light of the Board's report. With regard to your claim for selection to the post in question, it should be noted that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. The Secretary-General noted that your application, and that of other qualified staff, was fully and fairly considered by the Appointment and Promotion Board under the Vacancy Management and Staff Redeployment System in accordance with the Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 and Addenda 2, 3 and 5. The official record clearly shows that at all stages of the selection process the vacancy management procedures were strictly observed.
>
> The Secretary-General, as Chief Administrative Officer, introduced the Vacancy Management System, after consultation with the staff, as an appropriate measure to deal with an emergency situation. The Organization has been operating under the Vacancy Management System since 22 December 1986 when the Secretary-General promulgated it in ST/SGB/221 and ST/AI/338, and it thus became part of your conditions of employment.
>
> The Secretary-General has accordingly decided to maintain the contested decision and to take no further action on your case."

On 11 April 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Although the Joint Appeals Board held unanimously that the Vacancy Management System had been introduced without formal suspension or amendment of the staff rules governing promotion and that the Applicant had been deprived of the right to be selected by an independent body established after consultations with the appropriate staff representative body,

(a) The Board, by recommending token compensation, failed to exercise jurisdiction and disregarded the principle that reparation must, as far as possible, wipe out all the consequences of the illegal act;

(b) The Respondent, in his final decision, refused to state whether he was accepting or rejecting the Board's report.

2. The putative greater seniority of four candidates for the post in question was arrived at by virtue of years of delay on the part of the Administration in dealing with the Applicant's case, and the earlier judgement of the Tribunal did not compensate adequately the Applicant for all these ills. Nor is the existence of discrimination retroactively erased by the mere payment of $12,000. The Administration is under a continuing duty to see that the Applicant is treated fairly.

3. Consideration of the Applicant's candidacy did not meet the standards set by the Tribunal in the Williamson case nor the minimum standard of "fair treatment" insisted upon by the Tribunal in the earlier judgement.

Whereas the Respondent's principal contentions are:

1. Promulgation of a temporary Vacancy Management System by means of a Secretary-General's Bulletin and subsidiary administrative instructions was a valid exercise of the Secretary-General's discretionary powers to deal with an unprecedented financial crisis:

(a) The Secretary-General had the authority to promulgate the Vacancy Management System through a Secretary-General's Bulletin and administrative instructions;

(b) The Vacancy Management System was introduced after consultation with staff;

(c) The Vacancy Management System was reported to the General Assembly.

2. Continuation of the Vacancy Management System until completion of negotiations for a new promotion system with the staff pursuant to Chapter VIII of the Staff Regulations and Rules to amend the Staff Rules does not violate the Applicant's rights.

3. Implementation of the Vacancy Management System did not violate the Applicant's acquired rights, as promotion procedures are statutory in nature and subject to change.

4. The staff did not have any automatic right to an annual review and to promulgation of promotion registers under the prior promotion system. Suspension of that system therefore did not violate any rights of the staff.

5. The Applicant received under the Vacancy Management System the full consideration to which he is entitled.

6. Recommendations of the Joint Appeals Board are not binding on the Secretary-General.

The Tribunal, having deliberated from 15 October to 1 November 1991, now pronounces the following judgement:

I. The Applicant challenges a decision by the Respondent dated 13 February 1990 not to select him for promotion to a D-1 post. In challenging this decision, the Applicant draws in question the validity of the Vacancy Management System established by the Respondent in accordance with Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 issued on 22 December 1986, and subsequent addenda 2, 3 and 5 to that Administrative Instruction. The Applicant also asserts ongoing damage to the development of his career as a result of continued implementation of the Vacancy Management System, and that the decision appealed from represents a failure by the Respondent to abide by paragraph IX of Judgement No. 401 rendered by the Tribunal on 12 November 1987. The Tribunal will examine these points.

II. As to the latter claim, the Tribunal, in agreement with the Joint Appeals Board, finds no basis for concluding that the rejection of the Applicant for the D-1 post in question represented any lack of implementation of Judgement No. 401. That Judgement, in paragraph IX, did not call for more than future monitoring of the Applicant's career to avoid its being prejudiced by the events which gave rise to Judgement No. 401, or for the Applicant to receive more than the fair treatment that other staff

members are entitled to. The Tribunal expects that the Respondent will act in accordance with the said paragraph IX. It has not been established that the Applicant's non-selection for the D-1 post was related to the events which gave rise to Judgement No. 401, or reflected retaliation.

III. As to the Vacancy Management System, the Joint Appeals Board unanimously concluded that the System was introduced without a formal suspension or amendment of the relevant Staff Rules governing promotion and that therefore the provisions of staff rule 104.14 were still in effect. Although, as the Tribunal noted previously in Judgement No. 507, Fayache (1991), paragraph III, the Vacancy Management System was accompanied by some degree of confusion in its initial implementation, the Tribunal does not agree with the view of the Joint Appeals Board that a "formal" suspension or amendment of the relevant Staff Rules governing promotion was required in order for the Vacancy Management System to become effective. In this regard, the Tribunal agrees with the contention of the Respondent that the introduction of the Vacancy Management System could not reasonably have been understood as anything other than a temporary suspension of staff rule 104.14 as an emergency measure.

IV. The explanations of the proposed Vacancy Management System which were provided to staff representatives in the unfortunately abbreviated consultations which occurred shortly before 22 December 1986, as well as the contents of Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338, described a system that was so plainly incompatible with the annual promotion review and promotion register system described in staff rule 104.14 that no one could reasonably have failed to understand that the effect of the Vacancy Management System was, in the absence of a revocation of staff rule 104.14, a suspension of its provisions.

V. Moreover, contrary to the impression of the Joint Appeals Board that "only sketchy and general information on the system" had been furnished to the General Assembly by the Respondent with respect to the Vacancy Management System, the Tribunal finds that the reports of the Secretary-

General to the General Assembly set out the essential features of the Vacancy Management System with sufficient clarity to inform the General Assembly of how it would operate. From this, the General Assembly could not have escaped understanding that staff rule 104.14 was temporarily being suspended as part of the Secretary-General's emergency efforts to deal with the Organization's financial crisis.

VI. For example, in 1987, in his report to the General Assembly A/42/234 the Secretary-General stated in paragraphs 56-58 and 66(2)(g):

> "56. A further drawback to the recruitment freeze is that it is a blunt instrument, which operates haphazardly and further distorts the geographical distribution of the Secretariat, whenever staff happen to leave the Organization, for whatever reason. It thus leads inexorably to an increasingly irrational distribution of resources in relation to programme needs, just at the time when those resources need to be husbanded more carefully because they are declining. In the present circumstances I remain convinced that, out of fairness to the staff, the reduction of posts must be achieved to the maximum extent through attrition. Furthermore, the Organization does not have the wherewithal to meet the considerable financial outlays required to offer early retirement which, I believe, can be desirable in some instances, or to offer agreed termination to staff in contractual status.
>
> 57. In order to counteract the adverse effects of a continuing recruitment freeze and the process of attrition, I introduced, in December 1986, a new system of vacancy management and staff redeployment. There are two main objectives: to identify existing current vacancies which it is essential to fill in order to fulfil key programme mandates; and to redeploy to those essential posts staff occupying posts considered of less vital importance in the present contingency.
>
> 58. While this is essentially an emergency measure to alleviate the immediate impact of the financial crisis, it has been designed in such a way that it can logically lead into the phased retrenchment, linked to restructuring, required by the report of the Group of High-level Intergovernmental Experts. It will also pave the way for a more rational and equitable system of career development and of planned job rotation as posited in recommendation 49.
>
> ...

66(2)(g). A vacancy management and staff redeployment plan has been introduced to ensure the optimum distribution of the reduced staffing resources available in relation to the requirements of the mandated programmes, and build the foundations of a more equitable and effective system of career development ..."

VII. In the annex to that report, it is stated in paragraphs 28, 32 and 33:

"28. Also in response to recommendation 41, the name of the Office of Personnel Services has been changed to the Office of Human Resources Management. (Footnote omitted) The steps that have already been taken in this direction include recruitment planning, classification of posts, advertising of vacancies up to the D-1 level, competitive examinations (for external recruitment at the junior Professional levels and for promotion to these levels of staff from other categories) and, most recently, the development of career planning mechanisms on the basis of occupational groups. These mechanisms are already in place for staff in the General Service and related categories at Headquarters and will be set up in the near future for staff in the Professional category and above and for staff in the General Service and related categories at other duty stations. At the same time, more transparent methods of selection for appointment and promotion have been introduced. For instance, the system of vacancy management and redeployment of staff recently introduced to fill essential posts now vacant as a result of the recruitment freeze (footnote omitted) ensures, in particular, that staff are selected for vacant posts through a process involving a review by the appointment and promotion machinery.

...

32. As mentioned previously (see paras. 67-68 of the report and para. 28 of the present annex), the recently initiated vacancy management system reviews vacant posts to determine which should be filled, in the light of programme priorities, work-load and classified job descriptions. As part of the review called for under recommendation 15 (see paras. 68-73 of the report), a post-by-post review is being undertaken in each department and office in light of programme priorities, legislative mandates and the restructuring of the Secretariat to achieve the desired staffing profile for the Secretariat in 1990.

33. Thereafter the Secretary-General will consider instituting permanent mechanisms to deal with vacancies in the light of programme orientation and changing mandates, as may be decided by the legislative bodies, to ensure efficient use of resources as proposed in recommendation 56. Candidates for the vacant posts deemed essential will be reviewed by the appointment and promotion bodies, which will establish a short list of candidates from which programme managers will select the staff member to be assigned to the vacancy in their area."

VIII. In 1988, in his report A/43/286 the Secretary-General stated in paragraphs 78 and 80:

"78. The staff redeployment programme is being refined and should form the basis for a future rotation system. By advertising secretariat-wide vacancies open to internal candidates only, the programme enables qualified staff members from all duty stations to be considered for posts in their area of expertise. They are then reviewed by a joint staff-administration advisory body, which guarantees an objective and fair review. Thus, a number of staff members have been reassigned to a different duty station. The experience of other agencies in the common system with rotation schemes is being studied with a view to developing an approach corresponding to the specific needs of the United Nations Secretariat.

...

80. Specific criteria have been developed for the redeployment of staff to higher-level posts and for their promotion and have been communicated to the appointment and promotion bodies. Special criteria for the promotion of women have recently been extended to the vacancy management and staff redeployment programme. These criteria should together form the basis of a new promotion system based on open competition and clear requirements for each posted vacancy. The role and structure of the appointment and promotion bodies themselves are also under review."

IX. In 1989, in his report A/44/222 the Secretary-General stated in paragraphs 150, 152, 155 and 156:

"150. To facilitate the reassignment of staff to other functions, the Group of High-level Intergovernmental Experts recommended the recruitment of staff in the context of occupational groups. The Secretary-General endorses this approach. In fact, the recruitment of staff at

P-1/P-2 levels through competitive examinations by occupational group rather than by post is now firmly established and has been found to be very beneficial both to the Organization and to staff. Furthermore, the introduction of the vacancy management and staff redeployment programme on 22 December 1986 has ensured that the selection of staff for vacant posts is guided by occupational considerations, in that candidates with relevant qualifications regardless of duty station or departmental affiliation are considered, whereas under the promotion review conducted prior to the introduction of the vacancy management system, candidates were being compared to other staff members in the same organizational unit (department or office). The proposed career development plan is also based on occupational groups.

...

152. Job rotation among duty stations for Professional staff has been recommended. The vacancy management and staff redeployment system, which was announced in December 1986 and implemented in 1987, is one of the measures taken to increase job rotation and staff mobility in general. Since the introduction of vacancy management, a total of 57 staff members in the Professional category (33 per cent of all internal placement cases) have moved from one duty station to another. As a further measure to facilitate staff mobility, the Secretary-General has approved enhanced entitlements upon assignment or transfer to hardship duty stations.

...

155. Criteria for the promotion of staff have been developed in the context of the vacancy management and staff redeployment system, which is now fully operational. Detailed guidelines were also established for the selection and placement of staff under this system. The criteria are based on open competition and the matching of the candidate's qualifications with the requirements of the vacant post in the context of the relevant occupational group. Under this system, a candidate who has been selected for a higher-level post is promoted after six months of satisfactory service. As at 1 March 1989, 53 staff members have already been promoted under this new system and 85 staff members who have been selected for higher-level posts will be promoted in the next six months subject to satisfactory performance.

156. The existing appointment and promotion machinery is used to process the selection and promotion of candidates under the new vacancy management system. The possibility

> of restructuring the appointment and promotion machinery along occupational lines was considered but it was found that it would be administratively very cumbersome and would not bring particular benefits. The members of the appointment and promotion bodies, with their diverse occupational backgrounds, are able to make sound and objective judgements as regards the professional and technical qualifications of the candidates under review, provided the requirements are clearly stated and the qualifications of the candidates are well documented."

X. It may be noted that in paragraph 150 of his 1989 report A/44/222, the Secretary-General emphasized the difference between the functioning of the Vacancy Management System and the promotion review system prior to the introduction of the Vacancy Management System, a point which could have come as a surprise to no one. Indeed, as early as 2 December 1986, at a consultation meeting with the staff, it was recognized that the promotion register system was not expected to function as in the past (see attachment to the Amicus Curiae brief of the Staff Union, pp. 12-13). And in paragraph 155 of that report, further reference was made to the promotion process being governed by the Vacancy Management System. In paragraphs 28, 32 and 33 of the annex to the Secretary-General's 1987 report A/42/234, it was made quite clear that promotions would be subject to the Vacancy Management System and that the appointment and promotion bodies would perform only a screening function to establish a short list of candidates to fill vacancies from which programme managers would make final selections. Similarly, paragraphs 78 and 80 of the Secretary-General's 1988 report A/43/286 showed the General Assembly that the Vacancy Management System dealt with promotions in a manner quite different from staff rule 104.14.

XI. In response to each of the 1987, 1988 and 1989 reports of the Secretary-General, the General Assembly's reaction was to reiterate its support for the Secretary-General in the fulfillment of his responsibilities as Chief Administrative Officer. To be sure, none of these General Assembly resolutions reflected a decision with respect to the applicability or effect of article XII of the Staff Regulations on the Vacancy Management System, but, as indicated below, since the financial emergency which precipitated the Vacancy Management System was continuing, the authority of the Respondent

to maintain the Vacancy Management System also continued. Thus such resolutions do not have a binding effect on the staff as did resolutions of the type involved in, for example, Judgements No. 67, Harris et al (1956), para. 5; No. 236, Belchamber (1978), para. XVI; or No. 249, Smith (1979), para. VII. Nevertheless, if the General Assembly had regarded the actions of the Respondent during that emergency period as not being within his authority as Chief Administrative Officer or as necessitating the submission of new Staff Rules, it would presumably have made this known in one or more of these resolutions. Yet, there was no such indication on the part of the General Assembly.

XII. However, it does not follow from the foregoing that the necessary implication to be drawn is that the requirements of article XII of the Staff Regulations have been complied with or have been waived by the General Assembly. Without regard to any conclusions that might be drawn from the reports and resolutions discussed above, the Tribunal considers that, faced with a financial crisis, the emergency action taken by the Respondent in adopting and continuing in effect for the duration of the emergency the Vacancy Management System, which is not in conflict with any Staff Regulation, as well as the concomitant temporary suspension of staff rule 104.14 by virtue of Administrative Instruction ST/AI/338, was within the Secretary-General's authority as Chief Administrative Officer. Such an emergency action is not within the competence of the Tribunal to rescind. See, e.g., Judgement No. 237, Powell (1979), paras. XIII and XVII. Indeed, the Staff Union's Amicus Curiae brief submitted in this case concedes that the Secretary-General may take appropriate administrative action on a temporary or provisional basis to meet an emergency situation. Since the Vacancy Management System was instituted prospectively and the suspension of staff rule 104.14, as well as the related recourse procedure (both of which are of a statutory nature), were not retroactive in effect, no issue of acquired rights is presented. See, e.g., Judgement No. 266, Capio (1980).

XIII. It follows from the foregoing that the Tribunal does not find either the adoption of the Vacancy Management System by the Secretary-General as a temporary emergency measure and its continuation for the duration of the

emergency, or the accompanying implicit suspension of staff rule 104.14, as being outside the Secretary-General's discretionary authority as Chief Administrative Officer. Consequently, the Applicant's claims based on his contention that he was improperly deprived of consideration for promotion under the annual promotion register procedure provided for by staff rule 104.14 must fail.

XIV. The Tribunal notes the Respondent's statement that the emergency which gave rise to the Vacancy Management System ended at the close of 1989. However, the Tribunal has not been informed of any action taken by the Respondent to end the suspension of staff rule 104.14. Nor has the Tribunal been informed that a staff rule dealing with the Vacancy Management System has been duly promulgated or submitted to the General Assembly under article XII of the Staff Regulations.

XV. Since the application also challenges the ongoing effect of the Vacancy Management System on the Applicant's career, an issue addressed in general terms in the Amicus Curiae brief of the Staff Union, the Tribunal turns to that aspect of the case. The Organization is no longer in the emergency precipitating the Vacancy Management System. In view of this, the Tribunal considers that the suspension by Administrative Instruction ST/AI/338 of staff rule 104.14, a rule of major importance to the career of staff members, which was effected to establish the Vacancy Management System as a temporary emergency measure, cannot be continued indefinitely without conflicting with staff regulations 12.2 and 12.3. Cf. Judgement No. 237, Powell (1979). The purpose of those staff regulations and the rights of the staff would be seriously impaired by indefinite suspension of Staff Rules and their indefinite replacement by norms neither promulgated as Staff Rules nor submitted to the General Assembly for its review as contemplated by staff regulations 12.3 and 12.4.

XVI. In the circumstances here, the Tribunal finds that, upon the ending of the emergency, the Respondent had to end the temporary suspension of staff rule 104.14 or comply with article XII of the Staff Regulations within a reasonable period. The Tribunal considers that such a reasonable period will end three months after the date of notification of the judgement herein.

XVII. The Tribunal notes that during its forty-fifth session in 1990, after the emergency ended, the General Assembly received as in prior years a report from the Secretary-General (A/45/226) in which he again drew to the attention of the General Assembly, in paragraph 189, matters relating to the Vacancy Management System, and that the General Assembly, in its resolution 45/239, part A I, paragraph 17 requested:

> "... the Secretary-General to continue efforts to develop further and refine classification and evaluation systems and promotion procedures as an integral part of the vacancy management system ... and to report thereon to the General Assembly at its forty-seventh session."

XVIII. In the opinion of the Tribunal, neither the language of that paragraph nor, as noted above, any of the prior General Assembly resolutions touching upon the Vacancy Management System can be considered a decision by the General Assembly intended to modify or affect the application of article XII of the Staff Regulations to the current suspension of staff rule 104.14 or to the implementation of the Vacancy Management System.

XIX. The Joint Appeals Board also considered whether the Vacancy Management System procedures were applied in a fashion which discriminated against the Applicant in the actual selection in 1989 of a more senior candidate for the D-1 post. In agreement with the Joint Appeals Board on this issue, the Tribunal finds, after reviewing the facts, that the Applicant failed to establish discrimination against him in the selection process under the Vacancy Management System procedures.

XX. The Tribunal notes that on 24 August 1990 the Applicant in case No. 566 (Mr. Al-Atraqchi) submitted to the Joint Appeals Board the following document dated 23 August 1990 and signed by nine staff members, including Mr. Upadhya:

> "With regard to the D-1 post No. 88-P-PSC-267-NY, in PSCA [Political and Security Council Affairs], the following staff members, some of whom had applied for the post, would like to state that they were already aware, even before the vacancy announcement was advertised, that this D-1 post was earmarked for Mr. Nicolae Ion, who was

eventually selected to fill the said post and, unfortunately, this seems to be the established policy in filling vacancies in the Department."

Although this alleged impropriety is said to have occurred well before the selection in 1989 of the successful candidate and the Applicant was among the staff members who made the allegation in the Al-Atraqchi case, thus establishing that he was aware of it before the selection, the Applicant (Mr. Upadhya) made no mention of this in his case before the Joint Appeals Board or in his application to the Tribunal. The allegation of impropriety was brought to the attention of the Joint Appeals Board in the Al-Atraqchi case, as noted above, and then was mentioned for the first time by the Applicant in his written observations in the present case, after the Joint Appeals Board issued its report in the Al-Atraqchi case recommending that the allegation be investigated. Since this matter was not raised by the Applicant before the Joint Appeals Board, the Tribunal cannot address it further.

XXI. For the foregoing reasons, the Tribunal:

1. Subject to paragraph XVI above, rejects the Applicant's plea that the Vacancy Management System was invalid at the time of the contested decision.

2. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 1 November 1991

Jean HARDY
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/538
1 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 538

Case No. 566: AL-ATRAQCHI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 18 October 1990, Mohammed Ali Al-Atraqchi, a staff member of the United Nations, filed an application containing the following pleas:

"II. PLEAS

The Tribunal is respectfully requested:

1. To find that the Secretary-General has failed to suspend staff rule 104.14 (which governs promotions) as required by staff regulation 12.3, and that, therefore, the Vacancy Management and Redeployment System introduced by ST/AI/338 and addenda, is illegal.

2. To find that the discretionary power of the Secretary-General to promote staff members is not absolute as claimed by the Respondent during the JAB [Joint Appeals Board] proceedings.

3. To find that Applicant did not receive the fullest consideration with regard to his candidacy for the post D-1, Chief International Security and Regional Affairs Section, Department of Political and Security Council Affairs, No. 88-P-PSC-267-NY.

4. To find that the Secretary-General's refusal to accept the unanimous report of the JAB contradicts his commitment to accept all unanimous reports of the JAB, provided that they do not impinge on any major questions of law or principle.

5. To find that the Secretary-General's refusal to investigate, as unanimously requested by the JAB in paragraph 44 of its report, the contention that it was widely known that Mr. Nicolae Ion would get the contested D-1 post even before he was promoted, proves that the selection process was vitiated from the beginning.

6. To conclude that the selection process which awarded Mr. Ion a promotion to D-1 was, therefore, null and void.

7. To conclude that Applicant was the most qualified of all candidates.

8. And consequently, to order:

(a) Respondent to promote Applicant to the D-1 level, retroactively to the date when Mr. Ion was promoted to D-1.

(b) Retroactive wages and benefits at the D-1 level less wages and benefits received at the P-5 level from no later than the date of confirmation of the promotion which was denied to Applicant.

(c) Respondent to grant Applicant, in case this Tribunal does not wish to order specific performance, damages equal to two years net base salary.

(d) Additional damages for the continuous hinderance to the development of Applicant's career."

Whereas the Respondent filed his answer on 11 March 1991;

Whereas the Applicant filed written observations on 12 April 1991;

Whereas, on 27 August 1991, the Respondent submitted an additional document at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967 under a probationary appointment at the P-2 level as an Associate Statistician with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969 his appointment was converted to a permanent appointment and on 1 June 1970 he was promoted to the P-3 level

as a Statistician. On 1 September 1973 the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs, as an Economic Affairs Officer. On 1 April 1974 he was promoted to the P-4 level and, on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

In 1988 the post of Chief of the International Security and Regional Affairs Section, a D-1 post, became vacant in the Political Affairs Division of the Department of Political and Security Council Affairs. Its vacancy was announced in Vacancy Announcement 88-P-PSC-267-NY. Staff members at level D-1 or P-5 were eligible to apply. The Applicant and other staff members applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and Administrative Instruction ST/AI/338 of the same date (and its addenda).

According to this administrative instruction, the system was designed to fill through redeployment essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future, but it was only the first step towards establishing a more rational human resources management system and towards a more comprehensive procedure that would involve a thorough review of all posts in the context of measures being taken to streamline and rationalize the Organization. Under the new system, all posts vacant or expected to become vacant would be reviewed by departments and offices to determine which posts were essential in order to meet programme mandates; all vacancies to be filled would be advertised and qualified staff members would be invited to apply, including those serving within the office where the vacancy was located; the candidates would be reviewed and evaluated by a Redeployment Committee - whose functions would be initially entrusted to the Appointment and Promotion Board at Headquarters for posts in the Professional category and above - which would recommend a short list of staff members determined to be the best qualified for each vacancy; and the short list of candidates would be communicated to the heads of department or office concerned, who would then make the final

selection. However, as the 1986 promotion review was already under way, vacant posts already identified for staff members recommended for promotion would not be included in the review described above.

All applications for the post of Chief of the International Security and Regional Affairs Section were accordingly forwarded to the Appointment and Promotion Board which, at its 1524th meeting held on 16 March 1989, short-listed six candidates, including the Applicant, and decided that their names should be transmitted to the Department for final selection. Such transmission was effected on the following day by the Office of Human Resources Management in a memorandum from which it appears that only one of the six candidates had more seniority in grade than the Applicant. On 3 April 1989 the Office of Human Resources Management informed the Applicant that, after careful evaluation of his application for the vacancy, he had not been selected for the post.

On 20 April 1989 the Applicant requested the Secretary-General to review the administrative decision of 3 April 1989, stating inter alia that his academic background, work experience in the Department and seniority were superior to those of the staff member selected for the post and that the decision not to promote him to the D-1 level against the post in question was contrary to staff regulations 4.2 and 4.4. On 30 January 1990 the Applicant reiterated his request, asking for a reply within two weeks. On 27 February 1990, having received no reply, he lodged an appeal with the Joint Appeals Board.

The Joint Appeals Board adopted its report on 24 August 1990. The Board's conclusions and recommendations read as follows:

"Conclusions and Recommendations

40. The Panel unanimously

Finds that the Vacancy Management and Staff Redeployment System was introduced without the concomitant formal suspension or amendment of the relevant Staff Rules and Regulations governing promotion.

Finds that the General Assembly, by its resolution 44/185, has not approved the Vacancy Management and Staff Redeployment System and cannot be invoked, anyway, in support of the Respondent's position regarding this appeal, as it cannot have retroactive effects.

> Finds that the appellant did not show that he would have been promoted against the contested D-1 post if staff rule 104.14(f)(iii) had been adhered to. However, the appellant has been deprived of the right to be selected by an independent body established after consultations with the appropriate staff representative body, as set out in staff rule 104.14(f)(iii)(a), (b) and (c).
>
> Finds that the selection process was not entirely satisfactory and that doubts resulting from the appellant's statements have not been properly dealt with by the Administration.
>
> 41. The Panel recommends that the appellant be awarded a compensation corresponding to one month net salary.
>
> 42. The Panel makes no further recommendation in support of the appeal."

On 24 August 1990 also the Applicant submitted to the Joint Appeals Board the following document dated 23 August 1990 and signed by nine staff members:

> "With regard to the D-1 post No. 88-P-PSC-267-NY, in PSCA [Political and Security Council Affairs], the following staff members, some of whom had applied for the post, would like to state that they were already aware, even before the vacancy announcement was advertised, that this D-1 post was earmarked for Mr. Nicolae Ion, who was eventually selected to fill the said post and, unfortunately, this seems to be the established policy in filling vacancies in the Department."

The Joint Appeals Board accordingly included in its report additional remarks in which it stated in paragraph 44 that in view of the seriousness of the charge and of the fact that it was not competent to conduct inquiries which might involve disciplinary sanctions, it took note of the document and transmitted it to the Secretary-General with the recommendation that he establish a special investigating body to look into the matter.

On 6 September 1990 the Under-Secretary-General for Administration and Management communicated the Secretary-General's final decision to the Applicant in a letter reading in part:

"...

The Secretary-General has re-examined your case in the light of the Board's report. With regard to your claim for selection to the post in question, it should be noted that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. The Secretary-General noted that your application and that of other qualified staff was fully and fairly considered by the Appointment and Promotion Board under the Vacancy Management and Staff Redeployment System in accordance with the Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 and Addenda 2, 3 and 5 and that the vacancy management procedures were observed.

The Secretary-General, as Chief Administrative Officer, introduced the Vacancy Management System, after consultation with the staff, as an appropriate measure to deal with an emergency situation. The Organization has been operating under the Vacancy Management System since 22 December 1986 when the Secretary-General promulgated it in ST/SGB/221 and ST/AI/338, and it thus became part of your conditions of employment.

The Secretary-General has accordingly decided to maintain the contested decision and to take no further action on your case."

On 18 October 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General has failed to suspend staff rule 104.14, as required by staff regulation 12.3.

2. The discretionary power of the Secretary-General to promote staff members is not absolute.

3. The Applicant's candidature did not receive the fullest consideration.

4. The Secretary-General is committed to implement unanimous recommendations of the Joint Appeals Board.

5. The failure of the Secretary-General to investigate the affidavit signed by nine staff members stating that it was widely known that Mr. Ion would receive the promotion to D-1 even before he was officially selected proves that the selection process was vitiated ab initio.

Whereas the Respondent's principal contentions are:

1. The introduction and subsequent implementation of the Vacancy Management System was a valid exercise of the Secretary-General's responsibilities as Chief Administrative Officer. The Vacancy Management System meets the requirement of a fair and reasonable promotion procedure:

(a) The selection procedure complied with the Vacancy Management System;

(b) The alleged prejudice is not supported by facts.

2. Recommendations of the Joint Appeals Board are not binding on the Secretary-General.

The Tribunal, having deliberated from 15 October to 1 November 1991, now pronounces the following judgement:

I. The Applicant challenges a decision of the Secretary-General dated 6 September 1990 which did not accept a unanimous Joint Appeals Board recommendation of an award of one month's net salary to the Applicant in compensation for the Applicant having been deprived of his right to be considered for promotion under staff rule 104.14. In addition, the Joint Appeals Board found that the selection process under the Vacancy Management System was not entirely satisfactory and that doubts resulting from the Applicant's statements had not been properly dealt with by the Administration.

II. The premise underlying the Joint Appeals Board's recommendation regarding staff rule 104.14 is that, in the view of the Board, that rule was not effectively suspended by Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 and addenda 2, 3 and 5. The Tribunal, in Judgement No. 537, Upadhya (1991), has held to the contrary, and the

reasoning as well as the outcome of that judgement are applicable to this case. The Respondent was therefore on solid ground in viewing the Joint Appeals Board recommendation with respect to the Vacancy Management System and staff rule 104.14 as impinging on a major question of law or principle and in declining to accept the recommendation for the reasons stated in his decision of 6 September 1990.

III. The foregoing disposes of the Applicant's pleas 1 and 4. The Applicant also asks the Tribunal to find that the discretionary power of the Respondent is not absolute. Although this is clearly the case as is shown by the Tribunal's consistent jurisprudence on the subject of promotions, the Tribunal does not understand the Respondent to contend otherwise as suggested by the Applicant's plea 2. That plea, accordingly, requires no further consideration by the Tribunal. The Respondent's position is that the Applicant was properly considered for selection to the D-1 post in issue under the Vacancy Management System. The Tribunal will examine that question.

IV. In paragraph 24 of its report, the Joint Appeals Board considered the procedure that had been followed under Administrative Instruction ST/AI/338 with respect to the D-1 post, and stated that it "could not detect any evidence of discrimination in this selection process." The Board concluded that "the procedure set forth in Administrative Instruction ST/AI/338 and its addenda had been adhered to." However, the Board also expressed concern that in the selection of a candidate to fill the D-1 post, the candidate's assessment was based on criteria different from the qualifications required in the vacancy announcement. The Board expressed even greater concern because the Applicant had, without refutation by the Respondent, alleged that the decision to select the candidate who was appointed to the post had been made long before the selection process had actually taken place. If this were the case, it would have constituted unfair treatment of all the short-listed candidates other than the individual selected. This concern

was touched on again by the Board in its additional remarks when it commented on a document dated 23 August 1990 submitted by a number of staff members in support of the Applicant's allegation.

V. With respect to the Joint Appeals Board's concern regarding assessment of the successful candidate on the basis of criteria different from those set forth in the vacancy announcement, the Tribunal is unable to discern any material difference between the rather general description contained in the vacancy announcement and the criteria mentioned by the Under-Secretary-General for Political and Security Council Affairs in a note for the record dated 22 March 1989 which specifically focused on the contents of the official job description for the post. In addition, by a subsequent communication to the Legal Counsel dated 13 December 1990, which is not necessarily dispositive of the matter, the Under-Secretary-General denied that the selection was made before the selection process had actually taken place and further denied that the staff members who signed the document mentioned above had subsequently been threatened with retaliatory action.

VI. In view of the foregoing, the Tribunal is unable to conclude that the Vacancy Management System procedures were not fully adhered to, or to conclude on the record before it that the Applicant's non-selection reflected unfair treatment. The Tribunal concurs in the concern expressed by the Joint Appeals Board with regard to the document dated 23 August 1990 which is referred to above and endorses the Board's recommendation for an investigation. The Tribunal recalls its comments in Judgement No. 507, Fayache (1991), para. XVI:

> "It is surely desirable that the Administration do what it reasonably can, by word and by deed, to dispel such perceptions. For if they are ignored and not dealt with expeditiously, fundamental values of the Organization are apt to be eroded."

The Tribunal notes with dismay the apparent absence, on the part of the Administration, of any inquiry of the staff members involved with respect to either the perception or the alleged threat described by them to determine and evaluate their basis, and the absence of any other investigation beyond obtaining the comments of the Under-Secretary-General for Political and Security Council Affairs. The Tribunal trusts that the Respondent will (a) act on the recommendation made by the Joint Appeals Board in paragraph 44 of its report, (b) conduct a full investigation with respect to this matter, including the alleged threat of retaliatory action, and (c) take such further action, if any, as may be appropriate. The Tribunal considers that the inadequate action with respect to the concerns expressed by the Joint Appeals Board regarding the document dated 23 August 1990, in itself, constituted unfair treatment of the Applicant for which the responsibility of the Organization is engaged and that compensation should be paid to the Applicant for the injury to him.

VII. In agreement with the findings of the Joint Appeals Board with respect to the Respondent's adherence to the Vacancy Management System procedures, the Tribunal is unable to find, as urged by the Applicant in his pleas 3 and 6, that the Applicant's candidacy did not receive proper consideration, or that the selection process was void. With respect to the Applicant's plea 7, the Tribunal is not competent to conclude that the Applicant was the most qualified of all candidates, and it therefore does not enter into inquiries of that nature.

VIII. Since the application also challenges the ongoing effect of the Vacancy Management System on the Applicant's career, the Tribunal deems that paragraph XVI of Judgement No. 537, Upadhya (1991) is equally applicable here, and adopts the same findings and conclusions in this case.

IX. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the sum of $1,000 to the Applicant as compensation for the injury sustained by him.

2. Subject to paragraph XVI of Judgement No. 537, Upadhya (1991), rejects the Applicant's plea that the Vacancy Management System was invalid at the time of the contested decision.

3. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 1 November 1991

Jean Hardy
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/539
4 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 539

Case No. 556: BENTALEB

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas at the request of Mokhtar Bentaleb, a staff member of the United Nations, the Tribunal extended to 1 May 1990 the time-limit for the filing of an application to the Tribunal;

Whereas the President of the Tribunal, with the agreement of the Respondent, further extended such time-limit to 1 July 1990;

Whereas, on 29 June 1990, the Applicant filed an application containing the following pleas:

"II. Pleas

10. The Applicant respectfully request the Administrative Tribunal:

(a) To order, as a preliminary measure, the production of the report of the 1986 internal Promotion Panel of the Department of Technical Co-operation to the Under-Secretary-General of the Department (...).

(b) To find that the failure of the Administration to provide the Applicant with a performance evaluation report in time for the 1986 P-5 promotion exercise violated his contractual rights and seriously impaired his prospects for promotion.

(c) To find that the report of the Panel on Discrimination and Other Grievances in the Applicant's case was not given the required further consideration and eventual disposition by the Office for Human Resources Management, giving rise to a serious obligation on the part of the Administration to provide a prompt and effective remedy for the unfair and discriminatory treatment which the Applicant had suffered.

(d) To find that the Administration failed to fulfill the above obligation and, in fact, acted contrary to it.

(e) To decide that the Applicant's name be added to the 1986 P-5 Promotion Register and that his promotion be implemented retroactively as of 1986.

(f) To award to the Applicant damages and compensation in the amount of two years' net base salary."

Whereas the Respondent filed his answer on 27 August 1990;

Whereas the Applicant filed written observations on 28 September 1990;

Whereas the Applicant submitted an additional written statement and an additional document on 7 October 1991;

Whereas, on 15 October 1991, the Applicant withdrew his preliminary plea and submitted the document referred to therein;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 November 1971 and served under a succession of fixed-term appointments until 1 July 1973, when he received a probationary appointment at the P-2 level as an Associate Administrative Officer in the Training Service of the Office of Personnel Services. On 1 April 1974 he was granted a permanent appointment and promoted to the P-3 level as Administrative Officer. On 1 February 1977 the Applicant was reassigned as Recruitment Officer to the Technical Assistance Recruitment Service, Division of Recruitment. On 1 July 1977 he was promoted to the P-4 level and, on 1 July 1978, he was transferred to the Technical Assistance Recruitment and Administration Service, Department of Technical Co-operation for Development (TARAS/DTCD).

On 3 February 1986 the Assistant Secretary-General for Personnel Services initiated the 1986 promotion exercise by a memorandum in which he

requested all Heads of Departments and Offices to submit their recommendations for consideration by the Appointment and Promotion Board and its subsidiary bodies. Under paragraph 2 of the memorandum, Departments and Offices were required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner for the purpose of establishing the departmental list. Under paragraph 6, they were asked to ensure that all performance evaluation reports which were already due had been completed for all staff members in accordance with Administrative Instruction ST/AI/240/Rev.2 irrespective of whether or not those staff members were being recommended for promotion. Under paragraph 12, all recommendations for promotion were to be accompanied by "specific information as to whether or not a post will be available within the register year and, to the extent possible, an indication of the post number."

On 28 August 1986, in a memorandum addressed to the Under-Secretary-General of DTCD, the Director of the Programme Support Division (PSD), of which TARAS was a part, stated that on the advice of the Chief of TARAS, he had recommended the Applicant for a promotion to the post vacated by the Chief of Unit II of TARAS; the Departmental Panel, however, had suggested the transfer of a P-5 staff member of another Division - Mr. Argyriades - to that post and the Applicant felt that such a move would hurt his career advancement; in view of the negative effect that the transfer would have on the morale of a deserving staff member and possibly on other staff in TARAS, the Director of PSD requested the Under-Secretary-General to review the recommendations of the Departmental Panel in that particular case. On 1 September 1986 the Applicant was designated Officer-in-Charge of Unit II of TARAS. On 2 September 1986 he brought the issue of his promotion to the consideration of the Under-Secretary-General of DTCD in a memorandum in which he stated inter alia:

> "...
>
> 9) I was very distressed to learn upon my return from home leave and official mission that the DTCD Panel on promotion has not submitted - for your approval - my name for promotion. I understand that the Panel has instead recommended that this post (...) should be

given to another staff member. I wonder whether it is within the mandate of the Panel to recommend transfers instead of considering each case up for promotion on its own merit.

10) As the result of this unusual recommendation of the Panel (and since no P-5 post has been abolished) I would thus be denied promotion after almost ten years of dedicated work as a recruitment officer with TARAS.

11) I am convinced that the DTCD Panel on promotion, in its recommendations, has been very unfair to me; by simply recommending a transfer of personnel it has done great injustice to me.

..."

On 14 January 1987 a circular memorandum issued by the Under-Secretary-General of DTCD listed, among other redeployments effective immediately, the reassignment of Mr. Argyriades to TARAS. On 12 February 1987 the Applicant stated his claim for promotion in a memorandum addressed to the Chairman of the Appointment and Promotion Board.

On 13 February 1987 the Applicant wrote to the Executive Officer of DTCD drawing his attention to the fact that he had not had any periodic report since 30 June 1982. A periodic report covering the period 1 July 1982-31 January 1987 was accordingly prepared in March 1987 and the Applicant signed it on 19 June 1987.

On 19 February 1987 the Assistant Secretary-General for Human Resources Management sent "Guidelines for the appointment and promotion bodies" to the Chairman of the Appointment and Promotion Board. Paragraph (B) of section II of the Guidelines read:

"(B) Availability of posts

As in previous years, the following criteria should be observed in considering staff members for promotion:

- the functions of the post in question must be classified at the appropriate level;

- there must also be a budgeted post available for implementation of the promotion during the promotion year. Should it be necessary to clarify the status of a post, the Ex-Officio member, after

> consultations with the Department concerned and the Budget Division, will confirm to the Board whether or not the post is available for promotion."

On 7 April 1987 Mr. Argyriades was designated Deputy Chief of TARAS and a few weeks later the Applicant's service as Officer-in-Charge of Unit II of TARAS came to an end. On 17 June 1987 the 1986 Senior Officer (P-5) Promotion Register, which had been approved by the Secretary-General, was issued. The Applicant's name was not included in the Register.

In the meantime, the Applicant had, on 13 May 1987, brought the issue of his promotion to the attention of the Panel on Discrimination and Other Grievances (Panel on Discrimination), charging DTCD with a discriminatory attitude towards his case. On 12 November 1987 the Panel on Discrimination submitted its report to the Assistant Secretary-General for Human Resources Management. In its report, the Panel on Discrimination concluded that the Departmental Panel had acted unfairly in recommending the transfer of a staff member from another division to fill the vacant post, thus preventing the promotion of the Applicant, whose suitability for promotion had been clearly demonstrated by his performance record. The Panel on Discrimination recommended that the Applicant be considered for promotion immediately to a P-5 post within his Department or, if that was not possible, that he be redeployed or transferred to a suitable P-5 post in another Department of the Secretariat. On 24 December 1987 the Assistant Secretary-General for Human Resources Management forwarded the report of the Panel on Discrimination to the Under-Secretary-General of DTCD who, on 10 March 1988, sent him the following comments:

> "...
>
> 3. The first point raised in the report concerns the fact that Mr. Bentaleb was not recommended by the Department for promotion for P-5, even though he was internally recommended by the Director of his Division. We fail to see the point here, since Mr. Bentaleb's situation is identical to that of quite a few staff members of the Department (and surely of a large number of staff in the Secretariat as a whole) who, though recommended by their immediate supervisors or Directors remain nevertheless unrecommended by their Departments. To be exact, 14 P-4 staff in DTCD were recommended by their respective

Directors for promotion to P-5 in the promotion year under question (1986), against a total of 6 (six) available posts; the 8 staff who were not selected also had long seniority and meritorious performance, but obviously not all could have possibly been selected for Departmental recommendation due to the non-availability of posts.

4. In saying or implying that the Department had to recommend Mr. Bentaleb, the Panel takes the liberty to substitute its judgement for that of two promotion reviewing bodies, namely - the internal departmental review panel and then the APB [Appointment and Promotion Board]. As to the internal promotion panel, it comprised duly elected staff representatives and conducted its review in a most fair and thorough manner. In fact, the panel reviewed all staff for all posts, i.e. - Mr. Bentaleb was reviewed not only for the post in his immediate unit, but also for other P-5 posts in the Department. The fact is that the Panel selected other staff and I saw no reason not to accept their recommendations. Subsequently, the APB had the possibility of overruling the Department, so to speak, by including Mr. Bentaleb in the Promotion Register in lieu of one of our other recommendees. Indeed, the APB did just that in the case of two other of the Department's recommendees, but not in the case of Mr. Bentaleb. In other words - both the internal promotion review panel and the APB considered other staff to be more meritorious than Mr. Bentaleb for the six available posts in the Department. We see no issue here whatsoever.

5. The second point raised by the Panel concerns the fact that I, the Head of the Department, reassigned a P-5 staff laterally to Mr. Bentaleb's Division, thereby blocking (in the Panel's view) Mr. Bentaleb's promotion prospects. The Panel seems to question here the right of Heads of Departments to effect lateral transfers and in one way or another seems also to imply that Mr. Bentaleb had in effect an 'acquired right' to the P-5 in his Division, which right has been abrogated by the lateral transfer. Here again we see no validity in the Panel's position. Nobody has a 'right' to a post and no one can justifiably claim that any lateral reassignment would effectively block one's promotion opportunity for somebody. My reasons for the particular lateral reassignment in question were entirely substantive and called for. I would have made it even if the internal review panel had not recommended it to me but, as it happened, even the internal panel had the same idea. So, again, there is no issue here.

6. We therefore see no element of unfair or discriminatory treatment of Mr. Bentaleb in the Department and find no substantive validity in the Panel's report. The case boils down to the fact that two authoritative promotion review bodies have not selected Mr. Bentaleb for promotion against an available post. In that, the case has no more in it than what numerous other staff in the Department and throughout the Organization have often encountered."

While the work of the Panel on Discrimination was in progress, the Applicant had, on 27 August 1987, sent to the Chairman of the Appointment and Promotion Board a memorandum of recourse in which he argued that, since Mr. Argyriades was already at the P-5 level and therefore did not require a new P-5 post for his promotion, there was a P-5 post available for the promotion of the Applicant. On 18 December 1987 the Assistant Secretary-General for Human Resources Management informed the Under-Secretary-General of DTCD that the 1986 promotion recourse review was about to be finalized and that the Applicant's name was likely to be added to the P-5 Promotion Register; he asked him whether he could confirm that a post was available in the appropriate unit or office to implement such a promotion, should the Applicant's name appear on the Register. On 23 December 1987 the Under-Secretary-General of DTCD replied that there was no vacant post at the P-5 level in the Department. On 6 April 1988 the Chairman of the Appointment and Promotion Board informed the Applicant that, notwithstanding the additional information presented in his memorandum of recourse, the Board's re-examination of his case had not revealed that there had been an omission so significant as to afford grounds for amending its previous decision. On the same day an addendum to the 1986 Senior Officer (P-5) Promotion Register was issued. The Applicant's name was not included in the addendum.

After an exchange of correspondence in which he requested clarification regarding the decision of the Appointment and Promotion Board from the Chairman of the Board and from the Assistant Secretary-General for Human Resources Management, the Applicant filed a preliminary statement of appeal with the Joint Appeals Board on 29 April 1988. On 4 May 1988 he requested the Secretary-General to review the administrative decision not to include his name in the 1986 P-5 Promotion Register. On 15 July 1988,

having received no reply to his request, he filed a full statement of appeal with the Joint Appeals Board. The Board submitted its report on 29 November 1988. The conclusions and the recommendation of the Board read as follows:

> "Conclusions and Recommendation
>
> 54. The Panel concludes that the Administration was not obliged to follow the recommendation of the APB [Appointment and Promotion Board] to place the appellant on the 1986 promotion register.
>
> 55. The Panel concludes that the appellant had not sustained the burden of proving his allegations of discrimination and conspiracy and that there was no evidence that he had been treated unfairly.
>
> 56. The Panel concludes that the confidentiality of the APB process had not been observed at a stage when it was still necessary and that at a later stage when it appeared no longer essential, this confidentiality had been invoked to deny the appellant information in which he had a legitimate interest.
>
> 57. The Panel recommends that in future promotion exercises - or whatever processes take their place - confidentiality be strictly observed where necessary but that staff members be given full and correct answers to legitimate questions where essential confidentiality does not preclude it.
>
> 58. The Panel makes no other recommendation in favour of the appeal."

On 6 December 1988 the Under-Secretary-General for Administration and Management informed the Applicant that, having re-examined his case in the light of the Board's report, the Secretary-General had decided to maintain the contested decision. On 29 June 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. No up to date performance evaluation report concerning the Applicant was available either to the Departmental Panel or to the Appointment and Promotion Board.

2. The Departmental Panel was not competent to recommend lateral inter-divisional transfers of staff.

3. The finding by the Panel on Discrimination that the Applicant had been subject to discriminatory treatment placed an especially heavy burden on the Administration to provide a prompt and effective remedy, an obligation which the Administration has failed to meet.

4. The availability of a post was not a pre-condition for promotion.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion.

2. The availability of a post was an integral part of the 1986 promotion review.

3 There is no credible evidence of improper motivation leading to the decision of the Appointment and Promotion Board not to include the Applicant's name in the 1986 Promotion Register, or in the Secretary-General's acceptance of that Register.

The Tribunal, having deliberated from 22 October to 4 November 1991, now pronounces the following judgement:

I. In his pleas, the Applicant contests the decision not to include his name in the 1986 Senior Officer (P-5) Promotion Register and requests the Tribunal to decide that his name be added to that Promotion Register and that his promotion be implemented retroactively as of 1986.

The Applicant claims that during the various stages of the review process, his promotion did not receive the fair and objective consideration to which he was entitled according to the applicable rules, and that the process was flawed by discrimination and other irregularities.

The Respondent, while recognizing the Applicant's right to consideration for promotion, asserts that the Applicant was properly considered.

II. While recognizing the principle that promotions are subject to the discretion of the Secretary-General, the Tribunal has also considered that the rules and procedures regulating the promotion process contain safeguards to ensure fairness and objectivity in a process which is vital to staff members. Accordingly, the Tribunal has stressed that these rules and procedures are part of the conditions of service of staff members and should therefore be respected, correctly interpreted and properly applied. Moreover, in Judgement No. 470, Kumar (1989), paragraph IV, the Tribunal recalled that although it cannot substitute its judgement for that of the Administration concerning the standard of performance or efficiency of a staff member, it is competent to pass judgement upon applications alleging non-observance of pertinent regulations and rules or alleging prejudice or improper motivation.

III. Having said this, the Tribunal will examine whether the various steps of the promotion process were conducted improperly to the Applicant's detriment, as alleged by the Applicant.

IV. The Tribunal notes that the 1986 promotion exercise was initiated by the Assistant Secretary-General for Personnel Services through a memorandum of 3 February 1986 addressed to all heads of Departments and Offices in which he requested them to submit their recommendations for consideration by the Appointment and Promotion Board and its subsidiary bodies.

Paragraph 2 of this memorandum read in part:

> "As in the past, Departments and Offices are required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner for the purpose of establishing the departmental list." (emphasis added)

In implementation of that paragraph, DTCD established a panel to conduct its internal promotion review.

V. The Applicant states that, in conversations in March and April 1986 with the Chief of TARAS and the Director of PSD, he was promised that, considering the high level of his work performance and his seniority, he

would be put in charge of Unit II of TARAS when its Chief retired at the end of August, with a recommendation for promotion to P-5. Such a recommendation was indeed made to the Executive Office of the Department.

VI. The Departmental Panel did not endorse the recommendation for the P-5 post referred to above but proposed instead that Mr. Argyriades, a staff member of another division of DTCD who was already at the P-5 level, should be transferred to that post. On 28 August 1986, the Director of PSD made an appeal to the Under-Secretary-General of DTCD to review that proposal in view of its possible negative effect on the morale of the Applicant and possibly of other staff in TARAS. His appeal was unsuccessful.

VII. In view of the positive recommendation of the head of his division, his very good performance as documented in his service record, the favourable evaluation of his work by chiefs of service from other divisions, and his long seniority, the Applicant considered that the action of the Departmental Panel in rejecting his candidacy for promotion was unfair and discriminatory.

VIII. The Applicant challenges the validity of the recommendation of the Departmental Panel on the following grounds:

(a) The absence of an up-to-date performance evaluation report, which was aggravated by an improper evaluation of his work performance by the Departmental Panel; and

(b) An "excess of competence" (ultravires action) on the part of the Departmental Panel in recommending a transfer.

The Tribunal will now examine these contentions.

IX. According to the Applicant, the Departmental Panel considered his promotion in the absence of an up-to-date performance evaluation report. The Applicant rightly complains that he was not provided with a performance evaluation report for almost five years, not even upon the retirement of his immediate superior. The Tribunal considers that such a failure on the part of the Administration constitutes, in itself, an inexcusable violation of paragraphs 4 and 5 of Administrative Instruction ST/AI/240/Rev.2.

X. The failure to observe this important procedural requirement is even more serious when it affects consideration for promotion. Here the Applicant's most recent performance evaluation report at the time he was considered for the P-5 post at the departmental level in 1986 related to a period ending in June 1982. The Respondent tried to minimize the impact of lack of a recent performance evaluation report by saying that there were several performance evaluation reports covering the period from November 1971 to June 1982 in the Applicant's files.

The Tribunal considers the Respondent's argument inadequate for two reasons.

1. Besides the fact that paragraph 2 of Administrative Instruction ST/AI/240/Rev.2 emphasizes the importance of a "periodic evaluation system" as a basis for a "comprehensive career development system which includes ... opportunities for advancement", paragraph 2 of the memorandum dated 3 February 1986 of the Assistant Secretary-General for Personnel Services is explicit in this regard. It states that "All participants [in the internal promotion review] should be provided with all documentation relevant to the promotion review" including "up-to-date ... performance evaluation reports".

2. The Tribunal notes that the four years preceding the Applicant's consideration for promotion in 1986 by the Departmental Panel were a crucial period and that a timely assessment of his performance was therefore essential. Indeed, a reading of the performance evaluation report subsequently made for that period reveals very pertinent and positive elements substantiating the qualifications, abilities, resourcefulness and performance of the Applicant. Among these elements, the performance evaluation report in question noted that, following the retirement of the former chief of Unit II of TARAS, the Applicant served as Officer-in-Charge. This was of special importance in view of the Applicant's statement that, during recent years, he had at other times been designated Officer-in-Charge of Unit II when the Chief was on leave.

XI. In a tight competition between several candidates for a limited number of vacant posts, all evaluations, especially recent ones in favour of the staff member, ensure a fair and objective appraisal of his or her

performance and provide a basis for advancement. The Applicant was unfairly deprived of this opportunity in violation of his right to fair treatment.

XII. The absence of an up-to-date performance evaluation report was compounded by another irregularity committed by the Departmental Panel. Although at a later stage the Respondent did not question the qualifications of the Applicant, the file indicates that the Departmental Panel apparently had formed a negative judgement on the Applicant's work performance when it concluded that another staff member would be a better choice to fill the P-5 post vacated by the Chief of Unit II of TARAS. When the Panel on Discrimination and Other Grievances made inquiries as to justification for the conclusion reached by the Departmental Panel notwithstanding the recommendation of the Applicant's superiors, it found only innuendos and no concrete reasons or tangible evidence.

XIII. The Applicant took exception to the action of the Departmental Panel from another angle. He questioned the legality of its action in recommending the transfer of another staff member, already at the P-5 level, to the P-5 post for which the Director of PSD had recommended the Applicant. The Applicant argued that the Departmental Panel, in doing so, had exceeded its terms of reference. The Respondent's answer is that, in the memorandum of the Assistant Secretary-General for Personnel Services dated 3 February 1986 describing the mandate of the departmental panels with regard to the 1986 promotion exercise, there is no provision limiting the authority of the departmental panels solely to recommendations for promotion and excluding the possibility of transfers of staff members.

XIV. The Tribunal is unable to accept that argument for the following reasons:

First, the memorandum dated 3 February 1986 dealt exclusively with promotion. The title of the memorandum was "The 1986 Promotion Exercise". The memorandum addressed promotion requirements, their importance, different kinds of promotion - i.e., normal and accelerated - and the modalities for promotion. The memorandum also highlighted some General Assembly resolutions pertinent to promotion.

Secondly, the memorandum defined the composition of the organ which was to conduct internal promotion reviews, in this instance, the Departmental Panel. Paragraph 2 of the memorandum requested promotion panels to conduct the internal promotion reviews in a fair and objective manner for the purpose of establishing the departmental list. Nowhere in the memorandum is the possibility of a recommendation for transfer mentioned. Moreover, a lateral transfer which, in effect, may block promotion, as it did here, is contrary to the raison d'être of a promotion panel.

XV. The Tribunal therefore finds that the Departmental Panel's recommendation for a lateral transfer to the P-5 post for which the Applicant had been recommended by his superior also constituted unfair treatment. At the same time, however, the Tribunal is unable to conclude that this was a discriminatory measure taken in bad faith against the Applicant alone as a pretext for depriving him of an opportunity for promotion. An examination of the report of the Departmental Panel discloses that the Panel also considered the possibility of transfer with respect to other posts. Furthermore, the absence of any animus against the Applicant is shown by the fact that four other candidates were also affected by the lateral transfer.

XVI. The Tribunal accordingly holds that, in the departmental review, the Applicant did not receive the full, fair and objective consideration to which he was entitled, and that the applicable rules were violated in his case.

XVII. The Applicant claims that the consideration of his promotion at the level of the Appointment and Promotion Board was also marred by serious irregularities. The Tribunal will review the steps taken with respect to the inclusion of the Applicant's name in the 1986 P-5 Promotion Register in order to see whether any impropriety was committed.

XVIII. The Tribunal notes in this regard the following:

1. The Applicant's department did not recommend him for promotion and his name did not appear on the 1986 P-5 Promotion Register prepared by the Appointment and Promotion Board and issued by the Secretary-General on 17 June 1987.

2. On 27 August 1987 the Applicant availed himself of the recourse procedure to appeal against the non-inclusion of his name in the Register. He specifically argued that, since the staff member transferred to TARAS was already at the P-5 level and therefore did not require a P-5 post for his promotion, a P-5 post was available for the Applicant's promotion. The Applicant also submitted statistical information for the full year 1986 which showed that his output in appointments of project personnel exceeded that of his colleagues.

3. On 6 April 1988, an addendum to the 1986 P-5 Promotion Register was promulgated and the Applicant's name was again not included in it.

On the same day, the Applicant was informed by the Chairman of the Appointment and Promotion Board that his recourse had been unsuccessful. In his letter, the Chairman of the Board stated the following:

(a) The Applicant's recourse had been placed before the Appointment and Promotion Board, which gave it full consideration;

(b) Notwithstanding the additional information presented, the Board's re-examination of the Applicant's case did not reveal that there had been an omission so significant as to afford grounds for amending the Board's previous recommendation.

XIX. In fact, the letter of 6 April 1988 from the Chairman of the Appointment and Promotion Board did not accurately describe what had actually occurred. The Applicant's recourse of 27 August 1987 had been successful. The Board had found merit in the recourse and had added the Applicant's name to the 1986 P-5 Promotion Register, which had been recommended to the Secretary-General for approval. In the Tribunal's view, the recourse procedure before the Appointment and Promotion Board is, for obvious reasons, an important safeguard in connection with a staff member's

right to be considered fairly for promotion. Not revealing to the Applicant the truth about the fate of his recourse was a serious irregularity, detrimental to the Applicant's right to seek proper redress.

XX. After learning that the Appointment and Promotion Board had included his name in the Promotion Register but that his promotion had been opposed by the Assistant Secretary-General for Human Resources Management and the Under-Secretary-General of DTCD, the Applicant, on 18 and 19 April 1988 respectively, wrote to the Assistant Secretary-General for Human Resources Management and to the Chairman of the Appointment and Promotion Board stating that he had reason to believe that the Board had indeed put forward his name for inclusion in the Promotion Register, but that the Office of Human Resources Management had rejected that recommendation on the basis of a lack of an available post in DTCD. The Applicant urgently requested clarification with respect to these matters.

XXI. On 20 April 1988, the Chairman of the Appointment and Promotion Board replied to the Applicant's memorandum of 19 April 1988 stating that:

> "As you may know, the functions of the [Appointment and Promotion] Board are advisory in nature and its deliberations are considered confidential. Nevertheless, I can confirm to you that notwithstanding any position taken by the Board to recommend or not to recommend your promotion, the final decision was not to include your name in the 1986 P-5 Promotion Register."

XXII. This answer involved a serious irregularity. The Chairman of the Appointment and Promotion Board, having another opportunity to reveal to the Applicant the true fate of his recourse, did more than merely invoke the privilege of confidentiality. His words tended to create the impression that the Applicant's recourse had failed at the level of the Board. The Chairman of the Board knew that it was the Respondent who had deleted the Applicant's name from the 1986 P-5 Promotion Register after it had been added there by the Board. In the view of the Tribunal, the language of the above communication does not satisfy the principle of good faith which should govern the relations between the Administration and members of the staff.

XXIII. Indeed, the Respondent emphasized before the Joint Appeals Board that the Appointment and Promotion Board, at the recourse stage, had not rechecked the post availability situation but had recommended the addition of the Applicant and another DTCD staff member to the P-5 Promotion Register. The Assistant Secretary-General for Human Resources Management again checked with DTCD and, having been informed that no posts were available, did not accept the recommendation of the Appointment and Promotion Board as regards the Applicant. The Tribunal notes that the same sequence of events occurred as described in Judgement No. 495, Castellanos (1990), paragraphs X and XV, and entailed the same breach of confidentiality. The Respondent further asserted before the Joint Appeals Board that the Assistant Secretary-General for Human Resources Management had acted properly in not accepting the recommendation of the Appointment and Promotion Board to add the Applicant's name to the original register upon realizing that a vacant post was not available to implement the promotion.

XXIV. With regard to this final stage of the promotion process, the Tribunal finds as follows:

During the recourse procedure, the Appointment and Promotion Board, having received an up-to-date performance evaluation report on the Applicant and having taken cognizance of the report of the Panel on Discrimination and Other Grievances, was able to assess fairly and objectively the qualifications of the Applicant. It corrected the situation by including the Applicant's name in the Promotion Register. It thus overruled the prior negative assessment with regard to the Applicant's qualifications and at that stage was evidently satisfied that there was a vacant P-5 post.

XXV. However, instead of acquiescing in the fair and objective consideration by the Appointment and Promotion Board during the recourse procedure, the Respondent decided that the requirement of the availability of a post had not been met.

XXVI. Without doubt, the availability of a post was a requirement for the promotion. Nevertheless, the Tribunal finds, for the reasons set forth in

paragraphs XIII-XV above, that invoking that requirement after the Appointment and Promotion Board initially seemed to have satisfied itself on that score had the effect of compounding the unfair treatment of the Applicant discussed above. This is all the more so since the Respondent concedes that several staff members were added to the 1986 Promotion Register with the knowledge that there might not be available posts.

XXVII. The Tribunal recalls its Judgement No. 411, Al-Ali (1988), paragraph III, in which, while recognizing the principle that promotions are subject to the discretion of the Secretary-General, the Tribunal stated:

> "... staff members are promoted regularly according to an elaborate process governed by rules and procedures laid down in article 104.14 of the Staff Rules and related Secretariat issuances. These rules and procedures ... also contain safeguards to ensure fairness and objectivity in a process which is vital to the life of a staff member.
>
> The Tribunal considers that these rules and procedures are part of the conditions of service of staff members, and therefore they should be respected, correctly interpreted and properly applied, as long as they are in force."

The Tribunal also recalls its Judgement No. 495, Castellanos (1990), paragraph IV stating:

> "Moreover, the exercise by the Secretary-General of his discretionary power to approve or to disapprove the recommendations of the APB must not be tainted by forms of abuse of power (détournement de pouvoir) such as lack of due process, violation of the principle of good faith in dealing with staff members, prejudice or arbitrariness or other extraneous factors which may flaw his decision."

XXVIII. The Tribunal considers that the totality of what occurred in this case engages the responsibility of the Respondent and entails compensation for all the injury sustained by the Applicant. The Tribunal fixes this compensation at the amount of $ 35,000.

XXIX. Since the Tribunal has concluded that the Secretary-General's exercise of discretion in disapproving the recommendation of the Appointment

and Promotion Board for the Applicant's promotion was flawed for the reasons stated above, the Tribunal trusts that the Applicant will now receive from the Respondent the full and fair consideration to which he is entitled for promotion, at the earliest possible date, to a vacant P-5 post for which he is qualified, particularly in view of the unfair treatment to which he was subjected.

XXX. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay compensation to the Applicant in the amount of $35,000.

2. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 4 November 1991

Jean Hardy
Acting Executive Secretary